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TREASON UNDER THE CONSTITUTION OF THE UNITED STATES.[1]

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By our Federal Constitution[3] it is provided that:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

The Federal Criminal Code[4] makes substantially similar provision.

The most interesting aspect of the general question is the more particular one, whether seditious speeches, pamphlets, books, and other writings come within the definition, or, stating it differently, whether words may constitute an overt act of treason. The particular effort of this discussion, after outlining the law of treason in other respects, will be to show the distinction between the sort of language which may be used without risk of legal punishment and that other sort which may bring one into the shadow of the gallows.

Our American law of treason finds its sources and illustrations in the English cases. But before examining those cases it will be well to have before us a modern definition of treason. It is thus defined:[5]

"Treason is composed of two elements, the intention, which is an act of the mind, and the overt act, which is its physical correlative or counterpart. While the intention with which an act is done is recognized to be the true criterion by which to

1. A paper read before The Law Club of Chicago, October 26, 1917.

2. Of the Chicago Bar.

3. Art. III, sec. 3.

4. Sec. 1, U. S. Crim. Code; sec. 10165, U. S. Comp. Stat. 1916.

5. 28 Am. and Eng. Enc. of Law, p. 460.

judge whether the offense is treason, yet as the law does not punish the hidden and concealed workings of the mind, there must be some treasonable act of which the law can take cognizance.

"Mere words, whether spoken, written, or printed, are not, in themselves, treasonable."

Lord Campbell referred to this two-fold division of treason as "our peculiar doctrine of high treason, which constitutes an offense in the *intention,* but requires this intention to be manifested by an *act.*" [6]

Looking back for a period of nearly six centuries to the sources of our present law of treason, we find that in 1352, during the twenty-fifth year of Edward III, a statute was passed which had for its avowed purpose the elimination of a large number of those constructive treasons which had given rise to much injustice and many inconveniences. Before the statute of 25 Edward III, many acts which probably were crimes, but not of that high degree of criminality, were nevertheless treated by the courts as constructive treasons.[7]

The essence of these various treasons was that they were acts which tended to damage the royal dignity, that is, they were lèse majesté. Sir Mathew Hale said of this class of offenses: "Almost every offense, that was or seemed to be a breach of the faith or allegiance due to the king, was by construction and consequence and interpretation raised into the offense of high treason." [8]

The statute of 25 Edward III named seven forms of treason. We are directly interested in but two of them, and indirectly in a third. Two closely resemble our constitutional definition; the other is not treason in the United States. This statute defined these treasons as follows:

"If a man do levy war against our Lord, the King, in his realm."

"If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere."

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6. Campbell, "Lives of Chief Justices," Vol. IV, p. 308.
7. See Hawkins, "Pleas of the Crown" (Curw. ed.), I, 7.
8. Hale, "Pleas of the Crown," I, 80, 82.

"When a man doth compass or imagine the death of our Lord, the King, of our Lady, his Queen, or of the eldest son and heir."

Because many of the old indictments for high treason contained counts charging the accused with compassing the death of the king, in connection with counts either of levying war or of adhering to enemies, and because in many instances facts were admissible under the count for compassing the death of the king which were at the same time admissible under the counts for levying war and adhering to enemies, we should know something of that form of treason designated as compassing the death of the king, even though no such ground of high treason is included in the American law of today and indeed could not be, by the very nature of things.

Compassing the Death of the King

If we took the words, "compassing the death of the king," in their ordinary significance, we should undoubtedly assume the expression to mean accomplishing or bringing about the death of the king. Such, however, was not the legal meaning. What was meant was that the subject should be guilty of a breach of the allegiance owed by him to the king, to the extent of contemplating harm to him, that is, of wishing and desiring that the life of the king should be taken, or that he should lose his liberty or his throne, or that he should be put in such serious danger of losing his life, liberty, or crown as that one or the other might naturally result. It was, as may be seen, purely an attitude of mind. Such mental attitude alone, however, was not treason, at least not punishable treason, for the general rule was that an overt act was required. The true rule required that no matter how much the subject might in his own mind be guilty of such treacherous thoughts, it was only when he took some active, definite step toward making the wish coincide with the fact that he became guilty of legal treason. Blackstone says that "*compassing* or *imagining* the death of the king are synonymous terms; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect." [9]

9. Blackstone, Book IV, pp. 78-79.

There is another reason, besides historical interest, for examining this branch of treason. In the definition already given, it was said that "mere words, whether spoken, written or printed, are not in themselves treasonable." This is misleading, because it is perfectly clear from the older cases and authors that the question whether words could constitute an overt act of treason arose in cases of treason by compassing the death of the king, and had no relation to the other sorts of treason. The question whether words could constitute the treason of adhering to enemies did not arise. Hence we might lay aside the old decisions whether words constituted the treason of compassing the death of the king, were it not that a brief review of some of those cases, considered in connection with the fundamental distinction between the crime of treason and other crimes, will help to enforce the point that words may constitute the treason of adhering to enemies.

As already pointed out, the law of treason differed from that of other crimes in this, that the intention to break the ties of allegiance was the prime thing, and the overt act only necessary in order that purely mental processes might not be punished as crimes. Our ordinary law of crimes makes the act the vital thing whenever it is done with criminal intent. The methods of approach are absolutely opposite. If the crime of compassing the death of the king was merely contemplating or imagining it, how easy it was to accept any slight act as a sufficiently overt manifestation of that state of mind, and how natural to take the open or spoken word of hostility to the king as sufficient to complete the crime. Those were days of a highly developed technical and artificial mode of legal reasoning. The politics of the times were invariably involved in treason prosecutions. It was not very difficult, therefore, to reach some of the decisions which today rather shock our sense of fairness, and even then scandalized the more fair and open-minded judges. If you admit such a crime, then to avoid the conclusion that mere words, i. e., words expressing the mental attitude, may be the overt act, you must do so by distinguishing between those words which were merely and only evidences or manifestations of a traitorous state of mind, and those words,

such as words of advice, incitement, or persuasion which bore a real relation to the contemplated harm to the king. One of the older authorities described these latter words as "means made use of to that end," i. e., to the end of harming the king, and explained that the incitement constituted the overt act, and the words were the evidence thereof.[10] Whether we accept this refinement of reasoning or not, the result is that words of incitement may be regarded, and logically regarded, as overt acts or their equivalent. Let us look at a few of the old cases.

10. East, "Crown Law," I, sec. 55, p. 118; see also Hawkins, "Pleas of the Crown" (Curw. ed.), secs. 37-38, p. 15.

In the time of Edward IV, one Walter Walker resided at the Sign of the Crown, in Cheapside. He told his little child that if he would be quiet, he would make him heir to the Crown, and it ought to have been clear to any one that he referred to the inn, not to the throne of England. If so, there could not even have been a traitorous intent. But he was indicted for the treason of compassing the death of the king, was convicted and executed.[11] Even if there had been a treasonable intent, it is hard to see wherein there was any relation between it and the words spoken, since the latter did not betoken any intention to take steps to harm the king, nor were they of a character likely to incite others to do the king harm.

During the same reign, one Thomas Burdett owned a white buck which he kept in his park. Edward IV killed it in hunting. Burdett was enraged and said he wished the buck, horns and all, in the belly of him who counseled the king to do it. The king having acted on his own initiative, without counsel from any other, this was thought equivalent to wishing upon the king that very harmful meal, and so Burdett was indicted, tried, and convicted of treason.[12] Sir Mathew Hale says that Markham, Chief Justice, chose to give up his place rather than assent to the judgment. But Burdett was executed nevertheless. Some later historian discovered an error in the account of this case, and showed that the indictment was wholly dif-

11. Hale, "Pleas of the Crown," I, 115.

12. Hale, "Pleas or the Crown," I, 115.

ferent in that the treason alleged consisted in calculating the nativity of the king and prince, and thereupon declaring that they would not live long. The story changes, but our view does not, for the treason seems as remote under one as the other theory in the absence of any really traitorous intention, and in the absence of any real overt act. The words of this man bore no relation to any attempt upon the life of the king. If the first version of the case is accepted, he went no further than to wish (but not do) harm to one who, it appeared, was the king himself. In the other version, he merely announced a prediction as to the early death of the king, who, like all mortals, would some day die.

Another case was that of *Crohogan,*[13] who said in Lisbon in the ninth year of Charles I: "I will kill the king (the innuendo identified King Charles), if I may come unto him." Two years later he came to England (the case states it was for the same purpose) and was thereupon indicted, tried, and convicted of treason by compassing the death of the king, and was executed. But here the overt act was the coming to England with the intent of accomplishing that purpose, rather than the words said abroad. This case clearly differs from the others, for the coming into England for the very purpose of killing the king was in direct relation to possible death or harm to the king. While we may feel somewhat incredulous as to that being the real purpose of the defendant, it does not make a case of doubtful law.

In the case of Col. *Algernon Sidney,*[14] it was held that "to write is to act," and upon that theory it was held that committing to paper his ideas of the desirability of a different form of government was an overt act, although the papers never were published and were found concealed in a closet in his house when he was arrested.

Then there was *Peacham's* case.[15] He was a clergyman who wrote a sermon, which, it was thought, contemplated a subversion of the government. Although the sermon was never de-

13. Hale, "Pleas of the Crown," I, 115; Cro. Car. 332.
14. Foster, "Crown Law," 198.
15. Foster, "Crown Law," 198.

livered, he was regarded as guilty of treason; but he was pardoned, while Colonel Sidney was executed. The attainder in Sidney's case, however, was afterwards reversed by a statute passed in the first year of William and Mary.

These were all hard cases, and because they were hard, they tended to make the courts look upon words, other than those inciting harm to the king, as being insufficient overt acts. But in order to judge fairly of those decisions, it must be remembered that they all related to the peculiar form of treason, of mentally contemplating the death or injury of the king. It was oftentimes held that words, which, being spoken, were not overt acts, would nevertheless become sufficient overt acts if written, upon the theory that the greater deliberation with which words are committed to paper removed the words from that class which might be considered as the hasty, ill-considered words of passion.[16]

Our federal Constitution says that *"only"* levying war and adhering to enemies, giving them aid and comfort, shall constitute treason against the United States. These two forms of treason come to us from a long historic past, and our courts have uniformly held that the expressions "levying war," and "adhering to enemies, giving them aid and comfort," were adopted into our law with the same significance which the decisions of English judges and the interpretation of leading English authors gave them in England at the time of the adoption of our Constitution;[17] according to Chief Justice Marshall, they should have their ascertained and accepted meaning.[18]

Levying War

Compared with compassing the death of the king, these cases are simple, although some of them seem very odd.

In one case, a group of persons who gathered in warlike array and marched with flag and weapons to tear down bawdy

16. Hale, "Pleas of the Crown," I, 118.

17. U. S. *v.* Greathouse, Fed. Cas. No. 15254; 26 Fed. Cas. 21. U. S. *v.* Hanway, Fed. Cas. No. 15299; 26 Fed. Cas. 105, 126-7. U. S. *v.* Greiner, Fed. Cas. No. 15262; 26 Fed. Cas. 36, 38.

18. U. S. *v.* Burr, Fed. Cas. No. 14693, 25 Fed. Cas. 159.

houses, were held guilty of levying war.[19] Sir Mathew Hale refused to join in this judgment, and it is hard to understand why this was treason, rather than riot, unless we let our knowledge of the licentious and profligate character of Charles II, then King of England, lead us to the conclusion that it was regarded as an attack upon a royal institution.

Of course, actual rebellion was a levying of war.[20] The general definition of this treason requires that there shall be an array of force, usually by arms, directed against the king in his person or his liberty, these being a direct levying of war; or, directed against his laws or his royal prerogatives, the latter being called a constructive levying of war.[21] In America it is directed against national sovereignty, but the American cases of levying war are mainly of limited attacks on sovereignty, rather than of full rebellion.

A case of that type prominent in English politics of the time, and also in history and literature, was the case of Lord *George Gordon*.[22] He was charged with levying war. Readers of Dickens will recall the detailed accounts in "Barnaby Rudge" of the violence of the "No Popery" riots of 1780, when large numbers of persons, led by Gordon, endeavored forcibly to procure the repeal of the acts granting to Catholics in England privileges long denied them. One of the mobs, after plundering and burning generally, finally was directed to Bloomsbury Square and there attacked and burned the home of Lord Mansfield, Chief Justice of the King's Bench, destroying the library which that great judge had accumulated during many years of service at the bar and on the bench. He was the special object of attack because he felt the injustice of the anti-Catholic legislation and had made his attitude very clearly known. In fact, on the day when Gordon and his rabble invaded the houses of Parliament and violently made known their desires, Lord Mansfield, in the absence of the Lord Chancellor, was presiding in the House of Lords. Subsequently when called upon in

19. Hale, "Pleas of the Crown," I, 134.
20. Hale, "Pleas of the Crown," I, 144.
21. Note to Hale, "Pleas of the Crown," I, 158, 1st Am. ed.
22. Howell, "St. Tr.," XXI, 486-651.

that House for his opinion as to the acts of the authorities in finally, after much delay, using the military to restore order, he laid down the principle that: "Insurrections for a general purpose—as to redress grievances, real or pretended—amount to a levying of war against the king, though they have no design against his person, because they invade his prerogative and the power of Parliament which he represents." [23] It was on that occasion that he attracted the sympathy of his hearers to the great loss he had sustained when, in stating the law, he said: "I have not consulted books; indeed, I have no books to consult."

Gordon, being indicted, was defended by Erskine, afterwards Lord Chancellor, and Kenyon, afterwards Chief Justice of the King's Bench. Erskine's argument was one of the most brilliant of his life, and principally consisted in urging the jury to hold to the strict letter of the law of 25 Edward III, and not to be led away into constructions of it, and also in insisting that the whole purport of Gordon's plan was *peaceably* to petition for a repeal of the Catholic enabling acts, and that the subsequent events of riot, arson, and murder were no part of his plan. Lord Mansfield charged the trial jury substantially along the lines of his opinion to the House of Lords. In it he said:

"There are two kinds of levying war: One against the person of the King; to imprison, to dethrone, or to kill him; or to make him change measures, or to remove counselors; the other, which is said to be against the majesty of the king, or in other words, against him in his regal capacity, as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is, levying war against the majesty of the king; and most reasonably so held because it tends to dissolve all the bonds of security, to destroy property, and to overturn government, and by force of arms to restrain the king from reigning according to law." [24]

But the eloquence of the advocate prevailed over the law of the Chief Justice, for the jury acquitted Gordon.

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23. Campbell, "Lives of the Chief Justices," Vol. IV, p. 433.
24. Howell, "St. Tr.," XXI, 644.

The American cases follow the same lines. There are more of them than one would expect. A brief statement of facts of these cases will be followed by a concise statement of the law, which though differently applied, was similarly stated in practically all the cases. In 1794 the inhabitants of western Pennsylvania, who had derived their principal income from the manufacture and sale of whisky, and with whom whisky was used as money, on the basis of one gallon of whisky passing current as a shilling, arose against the United States Government, in what is commonly called the "Whisky Rebellion," against the levy of a tax of seven cents a gallon. Vigol, a leader of that rebellion, was indicted and tried upon a charge of levying war.[25]

The evidence in the case showed that the defendant, with others, many armed, in their determination to annul the effect of the Act of Congress levying this heavy tax, had compelled several excise officers to surrender papers, to take an oath not to attempt to enforce the law, had used violence toward the officers, and among other things had burned the home of the chief excise officer.

Justice Paterson charged the jury that these efforts to nullify by force an Act of Congress constituted the crime of high treason by levying war within the meaning of the constitution and laws of the United States. The defendant was found guilty and sentenced to death, but, through the clemency of President Washington, was not executed.

Another case growing out of the same "Whisky Rebellion" was that of *Mitchell*.[26] This defendant was one of those who participated in the violence aimed at suppressing the execution of the excise law, and particularly had participated in the burning of the home of General Neville, the chief excise officer. Justice Paterson presided at this trial as well, and pointed out that the attack on General Neville's house was not made in a spirit of revenge, nor against him as a private citizen, nor as an individual; that it was directed against him solely as a public official who was seeking to enforce an act of Congress,

25. Fed. Cas. No. 16621, 28 Fed. Cas. 376; also 2 Dall. 346; Wharton "St. Tr." 175.

26. Fed. Cas. No. 15788, 26 Fed. Cas. 1277; also 2 Dall. 348.

and was for the purpose of preventing the execution of the act of Congress, and of nullifying the act.

Mitchell also was found guilty and was sentenced to death, but he also was pardoned by President Washington.

In 1799 there was twice tried the case of *William Fries*,[27] charged with levying war. He was involved in the troubles in northern Pennsylvania where resistance was made to the enforcement of the act of Congress of 1798, imposing a tax on property. There had been frequent meetings of those who were organizing to oppose the operation of this Land Tax Act, and Fries had taken a prominent part in those meetings. He had threatened to terrorize and attack the tax officials, and had become captain of one such band, which assembled in military array with fifes and drum, and through intimidation compelled the United States Marshal to yield up prisoners.

The case was first tried before Justice Iredell and by Justice Chase the second time,[28] the second trial being allowed because of the bias of a juryman in the first trial. Justice Chase's charge to the jury followed substantially that of Justice Iredell in the first case. Fries was convicted by both juries, and this time was sentenced to death, but was afterwards pardoned by President Adams.

In 1807, the only treason case to reach the Supreme Court of the United States was there heard upon an application for a writ of habeas corpus. This was the case of *ex parte Bollman* and *ex parte Swartwout*.[29] These men were associates of Aaron Burr and were charged with treason by levying war, in connection with the expedition organized under the influence of Aaron Burr against the City of New Orleans, then recently become a part of the United States. Bollman and his associate had been arrested upon warrants and had been committed. The decision was by Chief Justice John Marshall as to the sufficiency of the affidavits inaugurating the

27. Fed. Cas. 5126, 9 Fed. Cas. 926; also 3 Dall. 515, Whar. "St. Tr.," 458.

28. Fed. Cas. 5126, 9 Fed. Cas. 924; also Whar. "St. Tr.," 610.

29. 4 Cranch (8 U. S.) 75, 2 ed. 554.

proceeding, and was in favor of the petitioners upon the ground that a conspiracy to levy war was not the levying of war, and that until men were assembled for the purpose of effecting by force and violence the treasonable conspiracy, there was no overt act of levying war. The affidavits did not sufficiently show this.

A little later in the same year, complaint was filed asking for the commitment of Aaron Burr himself upon two charges, one being treason by levying war. This preliminary hearing [30] was before Chief Justice Marshall. Burr was not held on the treason charge, Marshall pointing out that, although five weeks had elapsed since the decision of the Supreme Court in the *Bollman* and *Swartwout* cases, no further proof was even at that later date adduced to show that there had been an actual assembling of armed men, such as would be required to constitute the levying of war.

Nevertheless Burr was later indicted by the grand jury when it met, upon a charge of treason by levying war, and the case came on for trial [31] in August, 1807, before Chief Justice Marshall and District Judge Griffin. The indictment charged Burr with an intention to levy war, setting out as the overt act the traitorous assembling of armed men on Blennerhassett's Island in the Ohio River. Much evidence was taken, tending to show Burr's plan and the assembling of men at Blennerhassett's Island; that Burr planned, under cover of an attack of Mexico, in the then likely event of the United States going to war with Spain, to set up an empire in the southwest, which should include much territory of the United States. At times his plan ran so broadly as to include all the territory west of the Alleghanies. But the turning point of the case was the assembling on Blennerhassett's Island. While men gathered there, and some were armed, there was a fair inference that they might have gathered as a part of the Texas colonization scheme, with which Burr cloaked his enterprise, and their carrying arms might have been merely a part of the fashion and necessities of the frontier. Marshall held that the prosecution might control

30. Fed. Cas. 14692, a. 25 Fed. Cas. 2.
31. Fed. Cas. 14693, 25 Fed. Cas. 55.

the order of producing evidence, but when some evidence was produced as to the assembling, and it was fairly inferable that all to follow would be merely cumulative on that point and of no further effect, a motion was made and entertained to "arrest the evidence" upon the ground that the assembly of men at the Island had not been shown to have amounted to, or to have done any acts of levying war; that the defendant was not present with them at any time, and was in fact many miles away. The arguments on this motion were long and elaborate, but the motion was finally allowed, and the trial thus ended. The jury, however, seemed anxious to convict, for their verdict was: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We, therefore, find him not guilty."

The absence of Burr from the state, county, and federal judicial district in which the venue was laid, precluded the possibility of his having been a party to the only overt act of levying war shown by the proof. The assembling at Blennerhassett's Island was not a sufficient assembling to constitute in itself a levying of war, because the requisite that force and violence must be present was not complied with.

In the case of *Hoxie* and others,[32] an indictment in 1808 in Vermont for treason by levying war, charging the defendant with opposing by force the Embargo Law, an Act of Congress prohibiting exportations from the United States, the distinction was made between a private and a public purpose in opposing a law.

A man named Vandusen owned a raft of timber which was being sent to Canada. It was stopped by the United States collector who placed an armed guard of militia on it. In the absence of these soldiers, the defendant and fifty or sixty others, many of them armed, took the raft and started with it down Lake Champlain toward Canada. Their object was to earn a reward of eight hundred dollars, offered by Vandusen, if the raft was taken across the boundary line. The raft was just well started when the soldiers reappeared. There was considerable shooting between those on the raft and the soldiers

32. Fed. Cas. 15407, 26 Fed. Cas. 397.

on the shore, but no one was hurt. Hoxie participated in the shooting. The enterprise was on a contingent basis, nothing to be paid if unsuccessful. When the raft was successfully across the line, the men dispersed, received their reward and returned to their homes. The case was tried before Justice Livingston who charged the jury that the defendants had no more general purpose than that of a smuggler who seeks to avoid, and, if necessary, by violence to nullify, in the particular instance, Acts of Congress against smuggling; that this was clearly a case of a personal venture, not intended to destroy the Embargo Act for the purpose of setting it aside, but was a money-making enterprise directed toward the personal profit of the adventurers. The defendants were very promptly acquitted.

In 1842 the state of Rhode Island was practically in a condition of civil war, known as Dorr's Rebellion. Its fundamental law was the old charter granted by Charles II, which, even after some modification, still at that time contained a property qualification for suffrage which disqualified many citizens.

The "Suffrage Party," under Thomas W. Dorr, endeavored to establish a new constitution, granting broad suffrage, without the trouble of legal forms and methods. Dorr was elected governor under his own constitution. The legal authorities refused to recognize Dorr or his constitution. Both sides gathered troops. Dorr was arrested and imprisoned, but his efforts were not unavailing, for a more liberal constitution was adopted.

In the midst of the turmoil, a federal grand jury met, and Mr. Justice Story, circuit justice for Rhode Island, charged them relative to the situation. In that charge [33] he stated the law of treason as applied to a state, and stated how treason to a state might involve treason to the United States as well.

The Fugitive Slave Law of 1850, passed as a part of the so-called Omnibus Bill, or Clay Compromise of that year, occasioned several decisions on the law of treason. That law permitted a slave owner whose slave had run away to take out a warrant for his arrest and return, and to follow the absconding slave into every part of the Union; it authorized him to call on

33. Fed. Cas. No. 18275, 30 Fed. Cas. 1046-7.

local officials to enforce the process. The practice was to take the slave, when captured, before a United States commissioner for examination of the circumstances; and after a summary hearing, without any jury trial, and upon his order, the slave could be taken back to the state whence he came.

In 1851 a Boston mob broke into the United States Commissioner's room and rescued by force from the officers who held him a negro arrested as a fugitive slave. The trouble caused grand jury investigation. District Judge Sprague charged the federal grand jury [34] with reference to the situation.

Another case arising out of the Fugitive Slave Law was in Pennsylvania.[35] It began by a charge by District Judge Kane to the federal grand jury. A man named Gorsuch, his son and some others, including an officer, endeavored to arrest two negroes claimed as runaway slaves. A large crowd of negroes, probably all fugitives, fought with arms from the shelter of a building which they frequented. Apparently many of the local residents, who bitterly opposed slavery, had aided the negroes with arms and had organized the resistance. Gorsuch was murdered, his son badly injured, and others were hurt. Judge Kane charged the grand jury relative to the law of treason.

In consequence the grand jury indicted several persons, including one Hanway who had refused to assist a United States marshal who summoned him for aid, but stood watching the affray which resulted in the death of Gorsuch. But it was not shown sufficiently that he had attended or participated in the meetings held in the neighborhood to foster resistance to the enforcement of the law, and he was acquitted.[36]

The law laid down in these cases is substantially as follows:

That where men meet openly in armed array (not merely as secret conspirators), or in such crowds that mere numbers supply the element of force that otherwise might be given by arms, with the purpose and intention of nullifying or preventing the execution of a general law of Congress, not merely for some personal private ends, but with the idea of nullifying the law

34. Fed. Cas. No. 18263; 30 Fed. Cas. 1015.
35. Fed. Cas. No. 18276; 30 Fed. Cas. 1047.
36. Fed. Cas. 15299; 26 Fed. Cas. 105.

in all cases, such intention, so manifested, is the treason of levying war, even though but one law is aimed at and even though no complete overturning of the government is the object. That resistance to the United States in its sovereign capacity is the essential thing. That when war is actually levied and warlike action taken every person participating, and in whatever capacity, whether present with the troops or elsewhere aiding by obtaining supplies or the like, is equally guilty. But that where the overt act is merely the assembling with such intent, then one must be present to be guilty. That an attempt to overturn a state law is not treason against the United States unless the treasons are mingled as where Federal troops, called by state authority to suppress disorders, are forcibly resisted. That a sudden outbreak against the enforcement of an Act of Congress in a particular instance, not followed by continued opposition to the law, is not levying war.

This brings us to the second species of treason against the United States.

ADHERING TO ENEMIES, GIVING THEM AID AND COMFORT

It will be seen that the constitutional definition of this branch of treason clearly refers to the two elements of intention and act. "By adhering to their enemies," means the adoption by the accused person of such ideas and the harboring and development of such wishes and desires as clearly aligns such person, during time of war, with the enemies of the United States as against the United States and its allies. It comprises those who consciously and of their own free will and choice are not "on our side," but who put themselves in mental opposition to the purposes, wishes, and desires of the United States and its citizens while engaged in its foremost right and its chief duty as a nation, that is, of defending itself, its sovereignty and its rights. Such a person, although not yet legally guilty of the crime of treason, has nevertheless been guilty of a breach of his allegiance to the United States, and needs only to add to such breach of allegiance (which is the essence of treason) some overt act, to make him legally and completely guilty of the crime of treason. Some of the old authorities, by their use of

the expression, "adhering to enemies," appeared to include in "adhering," which is the purely mental act of choice, those other things which are really the overt acts which consummate the crime; thus broadening the intention to include the act. But, on examination, it is seen that in all such cases the whole case makes it perfectly clear that the intention, i. e., the disloyal adhering to enemies, had been consummated and effectuated by some overt act of giving them aid and comfort. Such deliberate choice of sides merely as a mental operation, even in time of war, and although to the extent of deliberate expression of such choice, is not legal treason, even though we may rightly consider it as having morally a treacherous aspect; but where the choice is expressed in language which goes beyond a mere expression of the speaker's opinion, and is designed, or may reasonably be expected, to afford aid and comfort to the enemy, either by furnishing information, suggestions, and advice as to military or naval movements and operations, or by hampering and hindering the efforts of the United States in its preparations for war, there is raised a different situation and one which we shall consider. This is the treason which today most interests us. Again we must go back to the English cases for an adequate starting point.

A leading case is that known as Lord *Preston's case*.[37] It occurred in 1691, during the war then raging between England and France. The indictment charged the preparation of information for the use of the French as to the military and naval forces of England, and alleged as the overt act that the defendants had embarked for France, carrying such information. The defendants, or some of them, negotiated with the owner of a fishing smack to convey them to France. This vessel lay down the river from London and within the county of Surrey, and the defendants came from the north bank of the Thames in Middlesex to Surrey-Stairs, and there got into the boat of a river-man, who sculled them down the river to the ship. They lay hidden in a narrow place in the vessel when passing points of possible detection. When toward the mouth of the Thames

37. Howell's "St. Tr.," XII, 646.

in the county of Kent the ship was captured, and the defendants were found hiding in their place of concealment. One or more of them had the letters and tables of information concealed, and endeavored to throw them overboard, but failed.

In the trial of the case Lord Preston raised the important point, that there was a variance between the indictment and the proof, in that the venue alleged an overt act of embarkation in the county of Middlesex, whereas the capture was made in the county of Kent, and the ship was embarked upon in Surrey.

There was an animated discussion between the Lord Chief Justice Holt and Lord Preston upon this point, in which Holt, speaking to Preston, said:

"If it be proved that your lordship had an intention to carry these papers into France, and took boat in order to go with them into France, in the county of Middlesex, wherever your lordship acted in order to that design, that is treason, and there you are guilty. It is treason complicated of several facts, done in several places."

To which Lord Chief Justice Pollexfen, sitting also in the trial, added:

"You began your journey in the county of Middlesex, for according to the evidence you took water at Surrey-Stairs, which is in the county of Middlesex, and every step you made in pursuance of this journey is treason, wherever it was."

There was no question whatever but that furnishing such information was treason. The ruling upon the point of venue is illuminating. It shows that when the traitorous intention and design are clearly manifested and proved, any act which is related to the design and tends to effectuate it, is such an overt act as the definition of treason requires. However slight may be this overt act which is a part of the carrying out of the traitorous design, it furnishes not only the venue of the crime, but the final fact necessary to consummate and complete it. Here, then, we have foundation for the view that the words of a speech or pamphlet may be the overt act of treason by adhering to enemies, since they may be either the initiating cause of a train of circumstances or one of the connecting facts in the entire chain.

Another leading case of a very interesting character was the trial of Captain *Thomas Vaughan,*[38] who was prosecuted for high treason on the high seas in 1696. England was still at war with France, and Vaughan was charged with aiding the French king by entering his service and cruising about on the seas with the intention of taking English ships.

No actual attack on an English ship was shown in the evidence. The defendant was found guilty, and upon a motion in arrest of judgment his counsel urged the insufficiency of the indictment, because it was not alleged that in adhering to the king's enemies, the defendant had specifically acted against the king. The argument was that even though Captain Vaughan had taken service under the French king, nevertheless, since France was at that time at war with Spain and Holland, as well as England, he might well have been cruising with the purpose and intention of molesting only Spanish or Dutch ships, and with no intention whatever of attacking English shipping.

Here again the discussion between the two Lord Chief Justices (Holt, of the King's Bench, and Treby, of the Common Pleas), furnishes the legal principles which are involved in the case.

Lord Chief Justice Holt positively stated that the cruising constituted the overt act. Counsel for the defendant, nevertheless, persisted in his effort to maintain that until the cruising had been shown definitely to be directed against England, there was not sufficient proof of an overt act. Thereupon Lord Chief Justice Treby, answering, said:

"What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies; and, contrary to this, if he confederate with and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But, then, you say, here is no aiding unless there were something done, some act of hostility. Now, here is going aboard, with an intention to do such acts; and is not that comforting and aiding? Certainly, it is. Is not the French king comforted and aided when he has got so many English subjects to go a-cruising against our ships?

38. Howell's "St. Tr.," XIII, 486.

Suppose they man his whole fleet, or a considerable part of it; is not that aiding?

"When they go and enter themselves into an arrangement, list themselves, and march, though they do not come to a battle, this is helping and encouraging. Such things give the enemy heart and courage to go on with the war, or else, it may be, the French king would come to good terms of peace. It is certainly aiding and comforting of them to go and accept a commission, and enter into their ships of war, and list themselves, and go out in order to destroy their fellow subjects and ruin the king's ships. These are actings of an hostile nature; and if these be not adhering, etc., it may as well be said that if the same persons had made an attack upon our ships, and miscarried it, that had not been so neither, because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty until they have success; and if they have success enough, it will be too late to question them."

This case emphasizes several points:

1st: That adhering to the enemy is the treason because of its treacherous breach of allegiance, and that the giving aid and comfort to that enemy is the overt act which both completes and evidences the treason.

2nd: That effectual aid to the enemy against allies of the sovereign power is just as much aid and comfort to the enemy as if directly against the sovereign power.

3rd: That the successful consummation of the treason is not necessary to make it a completed legal crime.

In the cases of *William Gregg*,[39] *Dr. Henzey*,[40] *Francis Henry de la Motte*,[41] and *William Stone*,[42] all very interesting cases, it was held that letters written and sent to a foreign enemy, giving information or advice, constitute overt acts of giving aid and comfort, under the treason of adhering to enemies, even if the letters are intercepted, and never accomplished their intended effect, and even though they might have advised against an attack or invasion; that the sending of intelligence, the collecting

39. Howell's "St. Tr.," XIV, 1371.
40. 1 Burr. 642.
41. Howell's "St. Tr.," XXI, 687.
42. Howell's "St. Tr.," XXV, 1155-1438.

of intelligence for the purpose of sending, or the hiring of persons for the purpose, all are overt acts, even if the intelligence never reaches the enemy.

A traitorous intention with an effort to effectuate it is treason. Success is not needed to constitute the crime.

Very few American cases of treason by adhering to enemies have occurred since the federal Constitution. There were a number during the Revolution under the Pennsylvania statutes.

In the case of *Malin,*[43] it was held by the court of oyer and terminer that it was not adhering to the enemy to join by mistake the American forces when intending to join the British, since there was no adherence to the British, and therefore no overt act of treason. This case is wholly out of line with the true principle involved and seems based upon the idea of ordinary criminal law which first looks at the act and then the intent. Here Malin had a traitorous intent and took an active step toward its realization, and would seem to have been guilty.

In the case of *Carlisle,*[44] he was held guilty and executed for treasonably accepting a commission from the British, contrary to the Pennsylvania statute.

In the case of *Roberts,*[45] he was held not guilty of "persuading" a man to enlist in the British army, because he failed, the man refusing to join. It was held that "persuade" meant accomplishment. But he was convicted and executed for himself joining the British.

In the case of *McCarty,*[46] it was held that his joining the British under compulsion was no defense, unless the compulsion was a reasonable fear of death for refusal; that injury to the person or harm to property was no excuse, and even where there was compulsion through fear of death, it could not last indefinitely, and only so long as compulsion existed.

The case of *Weidle,*[47] was misprison of treason by saying that life under English rule was happier and better than under

43. Respublica *v.* Malin, 1 Dall. 33, 1 Law. Ed. 25.
44. Respublica *v.* Carlisle, 1 Dall. 35, 1 Law. Ed. 26.
45. Respublica *v.* Roberts, 1 Dall. 39, 1 Law. Ed. 27.
46. Respublica *v.* McCarty, 2 Dall. 86, 1 Law. Ed. 300.
47. Respublica *v.* Weidle, 2 Dall. 89, 1 Law. Ed. 301.

American, and that the King of England would again rule, contrary to the Pennsylvania statute forbidding publicly speaking or writing against the public defense. This statute specifically made words treasonable.

In 1814, the first case of adhering to the enemy, since the federal Constitution, arose in the case of *Pryor*.[48] He was indicted for furnishing supplies to English forces during the war of 1812. Pryor was captured with a cargo of flour by the British squadron blockading the Delaware River. While still a prisoner, he came ashore with a party of armed English and endeavored to buy cattle for their use. His purpose was to use the cattle to ransom himself, his cargo, and his fellow prisoners. He was unsuccessful, but was captured by a militia force, and it very plainly appeared that he had facilitated the capture.

The charge of Justice Washington to the jury practically told them that Pryor had not been guilty of treason, saying that if his motive had been to aid the English in acts of hostility against the United States, then the mere leaving the English ship for the shore with that intention would have been an overt act. But so long as his motive was an honorable one, he had not been guilty of the treason charged against him, since he had not in fact done any act of giving aid and comfort to the enemy. If he had in fact obtained provisions, it would not be necessary, if he started with them for the enemy, that he should be successful in delivering them; but so long as the intention was not bad and was not effectuated, the defendant was not guilty. As a result, the jury found the defendant not guilty.

In 1815, one *Hodges*[49] was indicted for adhering to the enemy upon the following facts: After the battle of Bladensburgh, four stragglers from the British force, which was retreating from Washington after burning the capitol, were captured and held. The British commander sent back word that unless the prisoners were surrendered, he would burn a designated town. The defendant, who was a resident of that town, went with others to those holding the prisoners and demanded that the men be surrendered in order to avoid the destruction

48. U. S. *v.* Pryor, 3 Wash. Cir. Ct. Rep. 234
49. U. S. *v.* Hodges, Fed. Cas. 15374; 26 Fed. Cas. 332.

of his town. After some urging, the prisoners were delivered to the defendant, and he restored them to the British.

The speech of Pinkney to the jury in this case is regarded as one of the masterpieces of American forensic oratory, and his argument resulted in the acquittal of the defendant in spite of the statement of Justice Duval to the jury that in his opinion the overt act alleged and proved constituted high treason. But as Justice Duval also told the jury that they were not bound to conform to his opinion, and as his associate, District Judge Houston, said that he did not agree with any part of Duval's charge, except that the jury was not bound by it, the jury very promptly acquitted Hodges.

In 1861, several federal judges charged grand juries in their respective districts with reference to the crime of treason by adhering to enemies. In a charge by Judge Sprague in the District of Massachusetts, is this:

"If war is actually levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. Such part may be performed, not only by giving information or other direct aid to the rebels, but also by acts which tend and are designed to defeat, obstruct, or weaken our own arms." [50]

In a charge by Judge Leavitt, in the Southern District of Ohio, it was said:

"In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort. Or, if this be the natural effect of the act, though prompted solely by the expectation of pecuniary gain, it is treasonable in its character." [51]

He then points out that providing arms, supplies of any kind, transportation, intelligence, or information, constitutes overt acts of giving aid and comfort.

In a charge by Circuit Judge Nelson in the Southern District of New York, after saying substantially what is found in these

50. Fed. Cas. 18277; 30 Fed. Cas. 1049.

51. Fed. Cas. 18272; 30 Fed. Cas. 1036; also 1 Bond. 609.

other charges, he stated that words, whether oral, written, or printed, and however treasonable or seditious, do not constitute an overt act of treason within the constitutional definition.[52] He limited the use of such words as evidence to prove intention or to indicate the character of an act otherwise of a dubious nature. The language quoted in the first definition was based on this charge. The judge who made it was evidently misled by the criticisms of English judges and authors upon words constituting overt acts of compassing the death of the king, when they were not words of incitement or persuasion. It is quite obvious that he was speaking of what has already been referred to as "mere words," that is, expressions of sentiment having no relation to acts. If it was his intention to say that words of incitement or persuasion to criminal acts of treason were not themselves treasonable, he clearly misapprehended the whole trend of the decisions upon the subject, for even in cases of compassing death, the distinction was made.

This charge overlooks the distinction between words which are merely expressions of opinion and desire (and, therefore, at most only evidence of a traitorous intent), and those words which are the sources or springs of action, in fact are verbal acts. A man who expresses a desire that Germany shall win, and that the United States shall be defeated, or who utters similar sentiments, comes within the class of those not yet guilty of treason. For, however clear his intention to break his allegiance to the United States, no overt act has yet been committed. But, when, with traitorous design, he argues publicly against registering under the Selective Service Act; against obeying the call of the Local Exemption Boards; against enlistments in the army and navy; against the manufacture, sale, or supply of army and navy goods of all sorts to our own armies and to our allies; in favor of "sabotage," to hinder, delay, and destroy goods designed for army and navy use; or against the floating of a loan with which to purchase the multitudinous articles necessary to the successful prosecution of war, he is just as certainly aiding and comforting the enemy as if he sent intelligence of army or navy movements and advised how best to meet our war efforts.

52. Fed. Cas. 10271; 30 Fed. Cas. 1034; also 5 Blatchf. 549.

A composite statement derived from two text-book definitions [53] is that, in general, aid and comfort are given to enemies by an act of a citizen clearly indicating a want of loyalty to the government and sympathy with its enemies, and which, by fair construction, is directly in furtherance of the enemy's hostile designs. Of this nature is the supplying, or attempting to supply, whether by gift, hire, or sale, of arms, ammunition, provisions, or other articles of war, information and intelligence, means of transportation, and all other things which materially assist the enemy in the prosecution of the war. This whether the motive be merely sympathy of pecuniary gain, and regardless whether successful or not.

And by every rule of reason, of the same nature must be those acts which further the enemy's hostile designs by hindering, delaying, or interfering with the war preparations of the United States.

Let us apply these rules to present situations. If help is now given Germany against France, Great Britain, Italy, Japan, Serbia, Russia, Roumania, or any other of those nations which, with the United States, is now engaged in war on Germany, it is treason against the United States. If, therefore, ammunition, provisions or supplies intended for, or belonging to these nations which are our allies in effect, if not by formal treaty, are destroyed or impeded by strikes, ordered or entered upon with such treasonable designs; if recruiting by any of these nations is interfered with, or if similar acts are attempted, it is treason on the part of one owing allegiance to the United States, even though not specifically directed against the United States. If directed against the United States, it is treason beyond question.

And if such attempts are not successful, if they fail of their intended effect or purpose, still they are treason, fully and legally completed treason, for which an indictment may be brought and a conviction had and sustained. So, then, if the efforts of speakers and pamphleteers to cause such troubles do not actually, or cannot be shown actually to have accomplished their

53. 28 Am. & Eng. Ency. of Law, p. 466; 38 Cyc. 956.

intended results, nevertheless, if inspired by traitorous motive, and some act looking toward the intended results has taken place, the crime of treason is complete, even without proof of actual accomplishment. And in such cases, the adherence to the enemy is found in the black-hearted purposes which inspired and guided the traitor; and the overt acts are found not only in the open violence by which many such efforts would normally be attended, but also in the written or spoken words whereby such efforts are sought to be effectuated, if there is a natural causal connection between such words and the results sought by the traitor.

This really is the gist of this whole question. There cannot be any doubt that words of advice and recommendation which actually lead to the destruction of property intended to be used by the United States in its war preparations or operations, or which lead to delays or interference with such preparations or operations, are so closely related to such result by the ordinary rules of cause and effect, as to make the words merely one of the initiating causes.

And where the ordinary and reasonable expectation of all mankind must be that words inciting such acts will result therein, surely the words of advice or recommendation are overt acts of treason. Such words are verbal acts. It is no more necessary for such acts to be successful and accomplish their intended and natural results than that the traitorous Captain Vaughan, cruising for the purpose of destroying British shipping, should have been successful, or that the letters intended to convey military information (in the other cases referred to) should be received and acted upon.

When mere words are said not to be treason, what is meant is that words are not treason if their effect is ended when uttered; if they have not and cannot reasonably be expected to have further operative force; but if the uttered words are, on the contrary, of such a character that they aid, or may reasonably be expected to set in operation, a chain of circumstances or events leading to acts which hinder or delay a successful prosecution of the war, then such words fully answer any requirement as to overt acts.—*Ill. Law. Rev.*